

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1283

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Plaintiff-Appellee

Docket No. 77-1283

v.

DONALD NIANG, et al.,

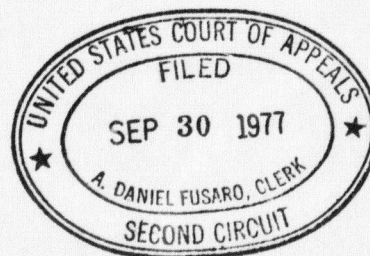
Defendant-Appellant.
-----X

Appeal from a Judgment of Conviction in the UNITED STATES
DISTRICT COURT for the Southern District of New York, Hon.
Lee P. Gagliardi, U.S.D.J. and a Jury.

BRIEF FOR DEFENDANT-APPELLANT NIANG

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I S S U E S P R E S E N T E D

POINT I

DID THE COURT ABUSE ITS DISCRETION UNDER RULE 609 OF THE FEDERAL RULES OF EVIDENCE WHEN IT ALLOWED THE GOVERNMENT TO QUESTION THE DEFENDANT-APPELLANT ON A 1974 CONVICTION FOR THE VIOLATION OF THE FEDERAL NARCOTICS LAWS?

POINT II

DID THE COURT ERR IN REFUSING TO GRANT THE DEFENDANT-APPELLANT A MISTRIAL WHEN THE WITNESS BARBINE DURING CROSS-EXAMINATION MADE AN INFLAMMATORY REMARK ABOUT THE DEFENDANT-APPELLANT?

POINT III

DID THE COURT ERR IN FAILING TO ALLOW COUNSEL TO QUESTION SPECIAL AGENT TAYLOR AS TO THE WHEREABOUTS OF THE CO-CONSPIRATOR FRED PETTAWAY?

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STATUTES

Federal Rules of Evidence - Rule 609

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

DONALD NIANG, et al.,

Defendants-Appellants.
-----X

BRIEF FOR DEFENDANT-APPELLANT NIANG

PRELIMINARY STATEMENT

Donald Niang appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 2, 1976, after a trial before the Honorable Lee P. Gagliardi, sitting with a jury.

The defendant-appellant was charged under indictment number 76 Cr. 916 with the crimes of unlawfully transporting interstate commerce securities, knowing the said securities were stolen and conspiracy to commit said acts. Charged in the same indictment were the co-defendants Albert Duke and Albert Williams. A trial on indictment under 76 Cr. 916 began on December 2, 1976 and was completed on December 8, 1976 when a jury rendered a verdict of guilty as to all counts against the defendant-appellant as well as to co-defendants Albert Williams and Albert Duke. (Gagliardi, J.)

On June 2, 1976 the Court sentenced the defendant-appellant to a term of imprisonment under Count 1 of the indictment of eighteen(18) months, under Count 2 to a term of imprisonment of six (6) months to run concurrently with the term of imprisonment imposed under Count 1, and under Counts 3, 4 and 5 the Court imposed a term of imprisonment of eighteen (18) months under each count to run concurrently with one another and to run concurrently with Counts 1 and 2.

The Court further imposed a period of probation of four (4) years to commence on the completion of the jail sentence. (Gagliardi, J.)

The defendant-appellant is presently on bail pending the determination of this appeal.

STATEMENT OF FACTS

GOVERNMENT'S CASE

Ronald Crosby began working for the Toledo Trust Company in August of 1974. In April of 1976 Crosby was working in the mail room as a mail clerk writing registered mail, sealing and posting envelopes as well as taking mail across the street (T45-46) While so employed he met his fiance's brother August Barbine, known to him as James, on a visit to Atlanta, Georgia in April of 1976. While on that visit August Barbine Jr. asked Crosby where he worked. And when he learned that he worked for a bank, he asked him if he could obtain securities from the bank. When Crosby said he could, Barbine told him he wanted to get in touch with him when he returned to Toledo. (T49-52, 159) Upon returning to Toledo, during the month of April 1976, he met his friend Pruitt Williams, who introduced Barbine to Ted Williams. Barbine told Ted Adams and Pruitt Williams that he could obtain securities from his brother-in-law Ronald Crosby who worked at a bank and asked them if they were interested. They both agreed they were and Barbine contacted Ronald Crosby to secure the securities. It was further agreed between Barbine, Adams and Pruitt Williams that after securing the bonds they would use Adams' friend in New York, Fred Pettaway to find a way to dispose of the securities. (T88-89), 136-138, 161)

Barbine then contacted Crosby and arranged with

him to have Ted Adams pick up some stock in the first week of May 1976. (T90, 162) The following day Crosby while working in the mail room took out some stock from a filing cabinet and delivered it to Teddy Adams who was waiting by a bus stop outside of the bank. (T56-57, 92) Adams in the presence of Pruitt Williams, returned to his apartment and met Barbine. The stock was put on an ironing board and showed, to the best of the witnesses' recollection, to contain two stock certificates valuing approximately seven (7) thousand dollars of Reliance Electric and Houston Natural Gas Corporation. (T92-94, 162-163)

At this time Ted Adams made a call to his friend, Fred Pettaway in New York, to see if Pettaway could help him find someone to dispose of the stock. When he was unable to reach Pettaway he left a message for Pettaway to call him back. When Pettaway returned his call, Adams told Pettaway he had something of value and wanted to come to New York with it but that he was broke and could not afford to pay for the trip. Pettaway told Adams he did not want to know what Adams had; would see if he could help, and would get back to him later. (T94-96, 139, 163).

On the Sunday following the stealing of the stock, Barbine met Crosby and made arrangements for Crosby to pass more stock to Adams. (T59) The next day Adams and Pruitt Williams were waiting by the bus stop when Crosby gave them a package which contained securities he had taken from the file cabinet in the mail room at the Toledo Trust Company.

(T60, 97, 139) Upon returning home, Adams, Pruitt Williams and Barbine discovered that Crosby had given Adams and Pruitt Williams in excess of one hundred (100) thousand dollars in securities. (T98, 140, 164)

Thereafter, Fred Pettaway called Ted Adams and asked him how soon could he make the trip to New York. Adams replied immediately and Pettaway told him that two tickets would be waiting for him at the Airline Terminal. A person by the name of Donald got on the phone and told Adams he knew Adams' problem and would help. Donald also asked about the merchandise. (T101, 164)

On May 12, 1976, Ted Adams and August Barbine flew via United Airlines to Newark, New Jersey, where they were met by Ted Pettaway and Albert Williams. They drove to New York, dropped off Pettaway and went to the apartment of Donald Niang on St. Nicholas Avenue in Manhattan. In the apartment Barbine and Adams met Donald Niang and Barbine showed the securities to Albert Williams who said he thought he could get rid of them. (T101-105, 166-168) After having dinner, Adams and Barbine accompanied Niang and Williams to Lenox where Williams and Niang left the car they were in and entered a building with some of the securities. They returned approximately twenty minutes later. (T108-169) They proceeded to Fred Pettaway's gym where a conversation was held in an office between Niang, Adams, Barbine and Williams. Williams asked Adams how much he wanted for the stock; Adams said half,

Williams retorting that he couldn't get that much for it. Niang then said if they had gotten bearer security notes it would have been much easier to get rid of them. (T169-170)

Adams remained in New York approximately a week and before returning to Toledo, Barbine called Crosby and arranged another theft of securities from the bank. (T172) Adams left on a round trip ticket. The second half of the ticket was used by Pruitt Williams to bring the stolen securities to New York. (T145) Pruitt was met at the airport by Barbine and proceeded with him to Niang's house where he remained for approximately two weeks before he returned to Toledo. (T146-147)

Over the next several weeks Barbine stayed in New York waiting for the proceeds of the sales of the securities which he never received. During that time he observed on several occasions Niang and Albert Williams speaking to a man he identified in Court as Albert Duke. (T174-180)

Later in the year, Crosby, Barbine, Adams, Pruitt Williams, as well as Niang, Albert Williams and Albert Duke were indicted in the Southern District, Barbine, Adams, Pruitt Williams and Crosby all plead guilty and were advised if they assisted the Government in the prosecution of the other defendants, their cooperation would be made known to the sentencing Judge. (T43-44, 82-83, 133-134, 155-158)

The Government further showed through Robert Block and Allen Harris, employees employed by the Toledo Trust

Company as Assistant Treasurer and Supervisor of Securities and Assistant Supervisor of Securities Administration respectively, that Monroe County Pollution Control Bonds, value \$2,287.44; Potomac Electric Power Co., value \$120,000; Reliance Electric Engineering Company, value \$560,000 and Houston Natural Gas Corporation, value \$6,000. were missing from the bank during May of 1976. (T320-354)

Mr. Wesley Thomas then testified that he was employed by United Airlines and that a record kept in the ordinary course of business by his company indicated that Ted Adams and August Barbine flew to Newark on May 12, 1976 on tickets purchased by Albert Williams of 630 Lenox Avenue. (T355-360)

A stipulation was then entered into that certain telephone records of a telephone listed at 630 Lenox Avenue, Apt. 10M, could be offered into evidence. It was so offered and certain calls from that phone 862-3213 were read to the jury. Toll calls indicated that during May calls from that New York number were made to Crosby's number and Adams' number in Toledo, Ohio. (T363-365)

At this point three Special Agents of the Federal Bureau of Investigation testified. Special Agent John Curran testified that he photographed Albert Duke entering and leaving the QD McGraws Bar and Grill on 41st Street in New York City on three occasions as well as photographing Special Agent John Hauss on three occasions entering and leaving the establishment on June 16, 1976. (T367-370)

Special Agent Dotlo testified that he was in the

QD McGraws Bar on June 16, 1976 and saw Hauss and Duke in conversation between 2:15 and 2:30 p.m. He then observed Duke and later Hauss leave separately. That Hauss returned at 3:20 p.m. and five minutes later Duke returned. They engaged in further conversation and during that conversation he saw Duke had given something to Hauss. (T381-383)

Special Agent John Hauss testified he met Albert Duke on June 3, 1976 and claimed he was John Knopp, a bank officer with a New York bank. He agreed to purchase stolen stock from Duke. On June 16, 1976 he met with Duke at the QD McGraws Bar and Grill and took from him the stolen securities of Houston Mutual Gas and Reliance Electric and Engineering Company, on the ruse that he was going to sell it for Duke and split the profits. (T392-397)

Special Agent Damon Taylor testified that he received the stock for Special Agent Hauss and in July contacted the Toledo branch of the Federal Bureau of Investigation regarding the stock. (T417-418)

At this point the Government rested its case.

DEFENDANT NIANG'S CASE

One witness was called on the behalf of the defense, Donald Niang. Prior to the defendant-appellant testifying on his own behalf, counsel for the defense called upon the Court to make a ruling under §609 of the Federal Rules of Evidence. The defendant-appellant had previously been convicted of the possession of a forged security document and received a sentence of one year probation (1972) and violation of the narcotics laws and received a sentence of probation (1974). The Court ruled that both convictions could be admitted into evidence under Rule 609.

DONALD NIANG testified that he was 43 years of age, married and the father of four children. That he was a high school graduate with almost ten years of service in the American Armed Forces. (T496-497) That he was presently receiving disability payments from the United States Government and the Hertz Corporation arising out of an automobile accident where his hands had been badly burned. (T498)

With regard to the charges before the Court, Niang testified that in the Spring of 1976 his brother Albert Williams had received a telephone call from Fred Pettaway asking if the witness and Mr. Williams were interested in setting up a boxing tournament between Toledo, Ohio, Cleveland and Philadelphia. After a meeting with Pettaway was arranged, Pettaway told the witness and Albert Williams that money would

have to be raised to bring August Barbine (a/k/a Jimmy Johns) and Ted Adams to New York. According to Niang the three, Niang, Williams and Pettaway, "chipped in" and sent an airline ticket to Toledo for Adams and Barbine (T501-502).

When Barbine and Adams arrived in New York, Niang met them at his apartment and took them to see Fred Pettaway. Pettaway informed Niang that he did not have room in his house to lodge them and asked Niang if they could stay at Niang's house. Niang consented and Pettaway agreed to pay \$50.00 a week to Niang for their lodgings.

While Barbine and Adams were staying at Niang's home nothing was accomplished regarding the establishing of a boxing tournament. Niang became suspicious of Barbine's intentions and after a period of three or four weeks, Niang asked Barbine to leave. (T503-504)

Niang denied any knowledge of any stolen stock certificates or any participation with Barbine to sell such certificates. (T505)

THE DEFENSE RESTED.

POINT I

THE COURT ABUSED ITS DISCRETION
UNDER RULE 609 OF THE FEDERAL
RULES OF EVIDENCE WHEN IT ALLOWED
THE GOVERNMENT TO QUESTION THE
DEFENDANT-APPELLANT ON A 1974
CONVICTION FOR THE VIOLATION OF
THE FEDERAL NARCOTICS LAWS.

The general rule for the impeachment of a witness by evidence of a conviction of a crime is governed by Rule 609 of the Federal Rules of Evidence. It reads as follows:

"(a) GENERAL RULE. For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

The defendant-appellant had been convicted in 1974 in the Southern District of New York for the crime of selling a controlled substance in violation of the United States Code. He received a sentence of probation after his plea of guilty to said violation. The Court allowed the Government to question the defendant-appellant about this conviction and abused its judicial discretionary powers under this section in doing so.

Rule 609 arose out of a line of cases beginning

with Luck v. United States, 348 F2d 763 (D.C. Cir. 1965). In the LUCK decision judicial discretion was given to the Court to determine if the use of a prior conviction will assist the truth finding purposes of the trial rather than prejudice the defendant in its use. Thus the issue was will the underlying conduct which lead to the conviction of the crime being sought to be introduced into evidence bear on the issue of the man's ability to testify truthfully and honestly. Gordon v. United States, 383 F2d 936 (D.C. Circuit 1967).

In the case at bar a conviction for being in possession of a forged security document which the Court allowed to be admitted under Rule 609 would go to the defendant's honesty and veracity but the admission of the drug violation would only instill in the Jury a feeling of dislike and loathing towards the defendant-appellant thus prejudicing the defendant-appellant's chances for a fair and impartial trial without adding any probative weight to the testimony.

The only way this conviction had probative value was for its impact upon the jury and the bolstering of the inflammatory statement made by the Government witness Barbine. Barbine knew that he could inflame the jury against the defendant-appellant by claiming that he received drugs from the defendant-appellant. This was stated to the jury by Barbine when he gave an unresponsive answer to a question during cross-examination. To allow this statement of Barbine to be bolstered prejudices the defendant-appellant to the

point where the trial cannot be considered a fair and impartial one.

The Court's reasoning in allowing the conviction to be used for impeachment purposes was clearly to bolster this inflammatory remark made by Barbine and to give it credibility. If the remark made related to the crimes charged in the indictment the Court's reasoning may have been sound but where it was strictly a collateral issue not adding anything to the proof of the case and only prejudiced the defendant, the Court's reasoning must be considered erroneous.

POINT II

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT-APPELLANT A MISTRIAL WHEN THE WITNESS BARBINE DURING CROSS-EXAMINATION MADE AN INFLAMMATORY REMARK ABOUT THE DEFENDANT-APPELLANT.

The defendant-appellant was on trial for a crime relating to the transportation and sale of stolen securities. The possessing or selling drugs by the defendant-appellant was not in anyway germane to this case. Yet during cross-examination of the Government's witness, August Barbine, the following occurred:

"Q. How much were you spending a day for drugs...?"

A. It wasn't --

Q. Prior to being arrested.

A. Mr. Niang and Mr. Williams was giving them to me.

Q. Please tell me how much you were spending.

A. I wasn't spending anything. They was giving them to me.

MR. SALAWAY: Your Honor, I move at this time for a declaration of a mistrial. That was not the question..

THE COURT: The motion is denied.

THE COURT: I will strike the answer if you wish.

MR. SALAWAY: Thank you, sir. If you would.

THE COURT: All right, if you make that motion.

One other thing, Don't ever thank the Court for a ruling. I rule here as a matter of law..."

Barbine's unresponsive answer indicating that Niang supplied him with drugs, was a calculated act by him to inflame the jury against the defendant-appellant. Although the Court struck the answer, the statement could not be removed from the juror's minds and could only have inflamed them to the point of depriving the defendant-appellant of the opportunity for a fair and impartial trial.

POINT III

THE COURT ERRED IN FAILING TO ALLOW
COUNSEL TO QUESTION SPECIAL AGENT
TAYLOR AS TO THE WHEREABOUTS OF THE
CO-CONSPIRATOR FRED PETTAWAY.

Fred Pettaway was a major party in both the prosecution's case and the defendant's case. The Government showed through the evidence they presented that it was Fred Pettaway who was the person contacted in New York by the conspirators Barbine and Adams in order for them to attempt to pass the stolen securities. It was Pettaway who assisted them in arriving in New York. And it is the same Fred Pettaway that introduced them to Niang and Williams. The defense did not ignore Pettaway in their version of the facts either. Niang admitted that Pettaway introduced him to Adams and Barbine but for allegedly different motives.

Whatever the involvement Pettaway had in this case and no matter what version of the facts the jury considered in reaching their verdict, there can be no doubt that Pettaway's testimony in the case would have added a great deal to the truth finding process that this trial was considered to be.

Pettaway was not under the control of the defendants and there was no way for the defendant to contact him. Pettaway was allegedly still under indictment and was not making himself available to the defense. But the

only way this could have been developed was through the questioning of Agent Taylor. The Court curtailed this questioning on the objection of the Government. (T426)

Further questioning if allowed may have led to the conclusion that Pettaway was available to the Government and not to the defense counsel. Which would have led counsel to request a missing witness charge whereby the trier of the facts may infer that their testimony would be unfavorable to the Government. U.S. v. Beekman, 155 F2d 580 (2nd Circuit 1946); U.S. v. Crisona, 416 F2d 107 (2nd Circuit 1969). Rather than have the defendants find themselves when that line of questioning is not open to them with a situation such as Erb, where the witness is allegedly available to both sides. U.S. v. Erb, 543 F2d 438 (2nd Circuit 1977).

All the defendants claimed that Pettaway was the one who took the securities and acted in concert with Barbine, Pruitt and Adams. The denial of this line of questioning (T426) deprived the defendant of a substantial right and necessitates a reversal of the judgment of conviction and the granting of a new trial.

CONCLUSION

BASED UPON THE ABOVESTATED POINTS
THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND A NEW TRIAL GRANTED.

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